

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
CoxCom, Inc.)	CSR-5887-A
)	
Petition For Modification of the DMA Market of)	
Television Broadcast Station KFPH(TV))	
Flagstaff, Arizona)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2002

Released: September 18, 2002

By the Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CoxCom, Inc. ("Cox") filed the above-captioned petition for special relief seeking to modify the designated market area of television station KFPH, Channel 13, Flagstaff, Arizona to delete certain communities located in the Phoenix, Arizona area ("Cox Communities").¹ Univision Partnership of Flagstaff, licensee of KFPH ("Univision"), filed an opposition to which Cox replied. After examining the record, we grant Cox's request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992* ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which

¹ The cable communities at issue are as follows: Scottsdale, Carefree, Maricopa, Paradise Valley, Tempe, Phoenix, Mesa, Chandler, Peoria, Youngtown, Sun City, Ahwatukee, Litchfield Park, Sun Lakes, Glendale, Luke AFB, Surprise, Goodyear, Fountain Hills, Gilbert, Apache Wells, El Mirage, Guadalupe, Roadrunner Travel, Buckeye, Casa Grande, Tolleson, Avondale, and Rio Verde. Petition at Appendix A.

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be

⁴For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note to paragraph [2]: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸*Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

⁹The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

¹⁰47 C.F.R. §76.59(b).

dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. KFPH is a full power television broadcast station that operates as an affiliate of the Telefura Spanish language television network.¹¹ It is licensed to Flagstaff, Arizona, which is assigned to the Phoenix, Arizona DMA. The Cox communities are located approximately 150 miles from KFPH's city of license. In support of its request, Cox argues that although the cable communities in question are located in the Phoenix DMA, which includes KFPH, the statutory factors considered in market modification cases support deletion of the Cox communities from the station's DMA.

6. We now consider the statutory factors based upon the facts supplied by the parties. The initial factor is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."¹² Since it began operating on December 31, 1991, KFPH has not been carried in the Cox communities. Cox also contends that none of the four VHF television stations licensed to Flagstaff have ever been carried by Cox in the communities in question. In considering this statutory factor, we must determine the circumstances contributing to this lack of historic carriage.

7. While admitting that Cox has never carried its station, Univision states that it did not acquire the station until late in 2001, and that for all intents and purposes, KFPH is a new station in the market with programming that is completely different from its predecessor's. In addition, Univision contends that of the other Flagstaff stations historically not carried by Cox: (1) KTFL has "apparently" never been on the air; (2) KCFG has recently started transmitting; and (3) KNAZ-TV is a satellite station of KPNX, a Phoenix station already carried on the system.¹³ In response, Cox contends that both KTFL and KCFG began operations in December 2000, and that Cox is able to carry KNAZ-TV, pursuant to Section 76.56(b)(5) of the Commission's rules, but has chosen not to. Cox also argues that because KFPH has been operational since 1991, it cannot contend to be exempt from the first statutory factor as a "new station."¹⁴

8. We are not persuaded by Cox that the lack of historic carriage should be given significant weight. We agree that the station is, for practical purposes, the equivalent of a new station because it now broadcasts specialty programming. Its current format bears no relationship to any of its previous identities. The Commission has recognized that specialty stations, because of their limited audience, have not been widely carried by cable operators absent must-carry obligations. In addition, because KTFL and KCFG have been operational only since December 2000, Cox's failure to carry the stations does not add credence to its arguments regarding historical carriage of other Flagstaff stations.

9. The second factor to consider is "whether the television station provides coverage or other local service to the community."¹⁵ We find that this factor weighs in favor of granting Cox's

¹¹KFPH was acquired by Univision in November of 2001. The Telefura network was launched in January of 2002. Prior to Univision's acquisition of the station, KFPH operated as a Home Shopping Network station.

¹²47 U.S.C. §534(h)(1)(C).

¹³Univision contend that the Commission's must-carry rules, and associated non-duplication issues, would prevent CoxCom from carrying KNAZ-TV, citing 47 C.F.R. § 76.56(b)(4)(ii). Opposition at 18.

¹⁴Cox cites *DeSoto Broadcasting, Inc.*, 13 FCC Rcd 2769 (CSB 1998).

¹⁵47 U.S.C. §534(h)(1)(C).

request. Cox contends that rather than providing local programming, the station appears to serve as a conduit for satellite-delivered national programming directed to a general audience. In response, Univision states the station provides more than four hours of local programming per week: (1) a three hour local news block entitled “Resumen Semanal” (Week in Review); (2) a half hour local public affairs program entitled “Esta Semana en Arizona” (This Week in Arizona); and (3) hourly one minute news briefs that cover various topics of local concern. Univision states that the programs are produced in Phoenix, and primarily cover topics of interest to the residents of the Phoenix metropolitan area.¹⁶ Cox argues that none of the named programs appeared in KFPH’s program line-up prior to Cox’s filing of the instant petition, and that the “random” television listings attached to Univision’s opposition failed to identify any of the supposed local programs.¹⁷ Cox argues that a search of five months of programming from the local Flagstaff newspaper¹⁸ reveals that of the supposed local programming, only “Resumen Semanal” aired one time, on June 2, 2002.¹⁹ In addition, Cox argues that even if the identified programs were broadcast, a point that Cox does not concede, only “Esta Semana en Arizona” identifies a few program topics specifically targeted to the cable communities. We are not convinced from the evidence submitted by Univision that KFPH offers significant programming directed at the cable communities in question. It is also not clear from the record that Univision’s stated programs have ever been broadcast on any regular basis. We find that these named programs, even if established as regularly scheduled, are insufficient to establish “coverage of or local service” to Cox’s communities.

10. Cox also points out that it is undisputed that KFPH does not place a Grade B contour over the Cox communities. As we have previously stated, lack of Grade B coverage is a valid indicator of no local service in market modification cases.²⁰ Cox provides a Longley-Rice analysis of the station’s signal contour, which takes into account intervening mountainous terrain between the station’s transmitter and the cable communities. Cox states that this analysis confirms that KFPH fails to provide any off-air signal to the communities served by petitioner.²¹ Univision does not contest Cox’s contention regarding the station’s over-the-air availability. Rather, Univision states that KFPH feeds its signal to co-owned low power television station KFPH-CA, Phoenix, Arizona, to ensure that KFPH’s signal is available to residents of the Phoenix DMA. We find this argument to be unpersuasive. The Commission has held that a station cannot rely on an affiliated low power station to extend the coverage area well beyond the reach of the station’s Grade B contour.²² It is clear that KHPH does not provide local over-the-air coverage to the Cox communities.

11. The third factor is “whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”²³ Cox states that it carries thirteen Phoenix-area television stations that serve the Cox communities with 179.5 hours per week of local programming, including local news,

¹⁶Opposition at 8.

¹⁷Reply at 15. *See also* Univision Opposition at Exhibit B.

¹⁸January 13, 2002 through June 8, 2002, except for the week of April 21, 2002, which was not available from *The Arizona Daily Sun*, the local Flagstaff newspaper.

¹⁹*See* Declaration of Edward J. Palmieri, Cox reply at Exhibit C.

²⁰*See Comcast Cablevision of New Mexico, Inc.* 16 FCC Rcd 12440 (2001).

²¹Petition at 9.

²²*See Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997), *aff’d*, *WLNY-TV, Inc. v. FCC*, 163 F 3d 137 (2d Cir. 1998).

²³47 U.S.C. §534(h)(1)(C).

sports, and public affairs programming.²⁴ Univision contends that the Hispanic viewers in the Cox communities have very limited sources of Spanish language programming from which to choose. In reply, Cox points out that two of the thirteen broadcast stations carried in the Cox communities provide exclusive Spanish language programming, including daily, locally produced Spanish language newscasts each weekday evening.²⁵ From the above, it is apparent that Cox transmits an abundance of local broadcast programming, including two Spanish language stations. Thus, the third factor weighs in favor of market modification.

12. The fourth factor is “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”²⁶ We agree with Univision’s argument that because KPTF-TV is a newly operational “specialty” station, very little weight should be given to its lack of viewership.²⁷ The Commission has long recognized that such stations, by their very nature, have limited audience appeal.²⁸

13. Univision also argues that the distance between the station and the cable communities should not be a determining factor, particularly in a large DMA such as Phoenix.²⁹ Univision continues that despite the size of such DMAs, the Commission has recognized the DMA as “the appropriate geographic standard” for determining whether a station is entitled to mandatory carriage.³⁰ In reply, Cox cites numerous market modification rulings in which the Commission and the courts have ruled against distant stations in the same DMA.³¹ Significant distance between the station and the cable communities should not be the sole determining factor in a market deletion case, particularly in a large DMA. Distance may be used, however, in conjunction with the statutory factors as an additional indicator of the station’s nexus to the cable communities in question. In the instant matter, the significant distance between Flagstaff and the Cox communities is simply an additional criterion to judge the merits of Cox’s petition.

14. Finally, we reject Univision’s request that it be given broadcast priority as a Spanish language station, because the must carry rules are content neutral. Carriage cannot be granted or denied based solely on factors related to the type of programming that a particular station carries.³²

²⁴Petition at 12.

²⁵ In addition, Cox states that it created “Mas Arizona,” Arizona’s first and only 24 hour Spanish language news and sports channel, which locally produces Spanish language newscasts in Phoenix. Cox also states that it carries eleven Spanish language programming channels. Cox Petition at 12.

²⁶47 U.S.C. §534(h)(1)(C).

²⁷Opposition at 20.

²⁸ See, e.g., *Paxson San Jose License, Inc.* 12 FCC Rcd 17520 (1997).

²⁹Univision contends that Flagstaff is less than 150 miles from Phoenix, and cites Cox’s comments in another proceeding where Cox stated the distance to be “approximately 120 miles.” Univision Opposition at 18. Cox replies that its estimate in the other proceeding has been corrected in the instant proceeding and that the correct distance according to a “standard Internet resource” is 150 miles. Cox Reply at 12.

³⁰Opposition at 19.

³¹See *Market Modifications and the New York Area of Dominant Influence*, *supra*; *Continental Cablevision of Jacksonville, Inc.* 14 FCC Rcd 13783 (1999), *pet. for review denied sub nom. WEYS Television Corp. v. FCC* (11th Cir. Apr. 9, 2001); *Comcast Cablevision of New Mexico, Inc.*, *supra*; *KBL Cablesystems of the Southwest, Inc.*, 12 FCC Rcd 21923 (1997).

³²See *Comcast Cablevision of New Mexico, Inc.*, *supra*.

15. The use of DMA market areas is intended “to ensure that television stations be carried in the areas which they serve and which form their economic market.”³³ Changes in these market areas are sometimes warranted “to better effectuate the purposes” of the mandatory carriage requirements.³⁴ In light of the evidence presented here regarding lack of Grade B coverage, significant geographic distance between the station and the Cox communities, lack of coverage or other local service to the Cox communities, and significant coverage of local matters by broadcast stations currently carried by the cable operator, we conclude that deletion of the Cox communities from KFPH’s market for mandatory carriage purposes fulfills the purposes of Section 614 of the Communications Act. We thus grant Cox’s modification request.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and Section 76.59 of the Commission’s rules (47 C.F.R. §76.59), that the captioned petition for special relief (CSR-5887-A) filed by CoxCom, Inc. **IS GRANTED**.

17. This action is taken by the Chief, Policy Division, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission’s rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Murphy
Chief, Policy Division
Media Bureau

³³ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

³⁴ 47 U.S.C. Section 534(h).

³⁵ 47 C.F.R. §0.283.